No. 97-1235

In The

Supreme Court of the United States

October Term, 1997

CITY OF MONTEREY,

Petitioner,

v.

DEL MONTE DUNES AT MONTEREY, LTD. and MONTEREY-DEL MONTE DUNES CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE MUNICIPAL ART SOCIETY OF NEW YORK, INC. IN SUPPORT OF PETITIONER

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The Municipal Art Society of New York, Inc. (the "Municipal Art Society") submits this brief, as *amicus curiae*, in support of the Petitioner and for reversal of the judgment of the Court of Appeals for the Ninth Circuit in this case reported at 95 F.3d 1422 (1996) (the "Ninth Circuit Opinion").

INTEREST OF *AMICUS CURIAE*[1]

The Municipal Art Society was founded in 1893 "to work towards the creation of a livable city . . . and particularly to use the Municipal Arts of Architecture, Landscape Architecture, Planning, Preservation and Public Art to improve and protect the physical environment of New York City."

In furtherance of that mandate, the Society has played a leading role in formulating and enacting New York City's Zoning Regulation, Landmarks Preservation Law and other land-use regulatory measures. These in turn have served as models for the rest of the nation. The Society also works with developers to achieve a fair accommodation between public and private interests in the development of particular properties and neighborhoods, the 5700-unit Riverside South development in Manhattan being a notable recent example. The Society also has filed amicus briefs in a number of regulatory taking cases before this Court, including *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978) and *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).

The Municipal Art Society's immediate interest in this case arises from recognition that efforts to specify when regulation goes "too far" have engendered some invention, and much uncertainty. The resulting lack of predictability breeds litigation. In the experience of the Municipal Art

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[1] Pursuant to Rule 37.6 of this Court, the Municipal Art Society states that this Brief was not authored in whole or in part by counsel for a party, and no person or entity other than the Amicus and its counsel made a monetary contribution to the preparation of this Brief.

Society, that is bad for regulators and bad for owners. It is bad for regulators because it diverts time and funds from the task of fairly accommodating public and private interests. Moreover, it "chills" the regulatory function when the threat of treasury-breaking litigation is used, as it often is, to force regulators to back off when they believe they should press forward. It is bad for owners because developers would usually far rather negotiate a less-than-"ideal" solution, knowing the likely outcome under established rules, than delay projects for years as litigation meanders to an uncertain result under vague standards or loose procedures.

The present case presents the opportunity to clarify two unsettling, and unnecessary, developments in the law of regulatory takings. Both the use of juries and the application of a "reasonableness" or "rough proportionality" standard to governmental planning decisions would very substantially increase the unpredictability of litigation in this field. The use of juries would have this consequence because juries may come to different verdicts on exactly the same regulation applied to neighboring parcels under identical circumstances. The reasonableness standard (especially when loaded with burden-heightening innuendo such as "rough proportionality") would do the same because it would allow courts to second-guess the deliberations of expert and politically responsive bodies, with uncertain results.

SUMMARY OF ARGUMENT

In all "takings" cases, the only relevant inquiry is whether the owner has satisfied all three prongs of the Takings Clause. These are that (a) the subject of the taking must be "property," (b) the property must be "taken," and (c) the "taking" must be "for public use." If all these elements are satisfied, the owner becomes entitled to "just compensation." If any one is missing—such as where a regulation does not serve a "public use"—the owner is not entitled to "just compensation" under the Fifth Amendment,

although he may still obtain some other statutory or constitutional remedy.

This case raises substantive and procedural issues about how courts conduct this inquiry. As a matter of substance, courts have long shown great deference to government determinations concerning the "public use" prong of this test. The applicable test has been formulated under a variety of labels, including "public use," "public purpose," and "substantial advancement of legitimate state interests," but, no matter what the label, it has always been construed as requiring no more than a determination that there is a rational basis for both the decision to regulate or otherwise act and the means chosen to implement the decision. Such was the case when federal, state and local governments first took land through their powers of eminent domain, and it has remained the case since this Court first definitively held that government regulation that went "too far" could effect a "taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

The latitude afforded to "takings" determinations as a matter of substance has been mirrored in the procedures used to judicially resolve challenges to such determinations. Whether direct or indirect, "takings" determinations have generally been subject to very narrow review by courts sitting without a jury. This Court has long recognized that there is no Seventh Amendment right to a jury trial, with respect to any issue, in an eminent domain proceeding, and jury trials have been permitted in such proceedings only as expressly sanctioned by statute or state constitution. While the Court has not yet specifically so held with respect to regulatory taking claims, the vast majority of this Court's regulatory taking cases presume that all issues other than "just compensation" will be decided without a jury, and this presumption is borne out by almost universal practice in state and federal courts.

The Ninth Circuit's decision in this case would turn this precedent on its head by permitting judges and juries to second-guess the policy determinations of States, Congress, and the Executive in "takings" cases. As a threshold matter, the Ninth Circuit wrongly interpreted *dicta* in this Court's regulatory taking precedents suggesting that "just compensation" might be required where government action *either* fails to serve a public purpose *or* deprives land of all economically viable use. This disjunctive standard, which would allow landowners to recover without satisfying all prongs of the Takings Clause, is at odds with both the language of the Fifth Amendment and this Court's actual practice in its regulatory takings cases. Next, in place of the "rational basis" test for relating means to ends historically applied in both direct and indirect takings cases to satisfy the "public use" test, the Ninth Circuit mandated that a "roughly proportional" or "reasonable" relationship be shown between the "taking" and the "public use." Finally, instead of leaving the "public use" issue in the hands of the trial judge, who—accustomed to the use of balancing tests—is best equipped to resolve it rationally and consistently, the Ninth Circuit placed the "public use" issue in the hands of juries which are likely to decide it on an *ad hoc,* non-uniform basis that would lead to inconsistent results even where the facts are the same and a single regulation involved.

POINT I

GOVERNMENT "TAKINGS" OF LAND, WHETHER DIRECT OR INDIRECT, HAVE HISTORICALLY BEEN SUBJECT TO REVIEW BY THE COURT ALONE, ACTING WITHOUT A JURY

The Seventh Amendment does not require a jury trial when an inverse condemnation or regulatory taking claim is

asserted in federal court by way of 42 U.S.C. § 1983.[2] Under both the "historical" and "functional" tests applied to decide Seventh Amendment entitlement to a jury trial, regulatory taking liability issues should be determined by the court.

A. THE RIGHT TO A JURY TRIAL IS DETERMINED BY APPLICATION OF THIS COURT'S "HISTORICAL" OR "FUNCTIONAL" JURY RIGHT TESTS

In deciding what types of proceedings and issues entitle a litigant to a jury trial under the Seventh Amendment, this Court has long used an "historical test" that asks first how the claim or issue, or its closest analogue, was treated in 1791. The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Since Justice Story's day, this Court has understood "the right of trial by jury thus preserved is the right which existed under English common law when the amendment was adopted." *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *see Feltner v. Columbia Pictures Television*, 118 S.Ct. 1279, 1284 (1998).

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[2] The fact that Del Monte's regulatory taking claims were asserted in a federal court by means of 42 U.S.C. § 1983 is immaterial. Section 1983 is a mere conduit, used for the vindication of rights guaranteed by the federal Constitution. Section 1983 in and of itself confers no substantive rights and prescribes no specific remedies or procedures beyond providing that Section 1983 claims may be asserted in an "action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. Under this broad mandate, when a regulatory takings claim is asserted under Section 1983, the proceeding in which it is asserted is best characterized as neither an "action at law" nor a "suit in equity," but rather as an "other proper proceeding for redress," with any entitlement to a jury trial judged by reference to the Fifth Amendment content of the claim rather than analogy to other claims assertable under 42 U.S.C. § 1983.

"In keeping with [its] long-standing adherence to this 'historical test,'" the Court has generally asked, "first, whether we are dealing with a cause of action that either was tried at law at the time of the Founding or is at least analogous to one that was." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). In this process, the Court must search the English common law for "appropriate analogies" rather than a "precisely analogous common-law cause of action." *Tull v. United States*, 481 U.S. 412, 420-21 (1987). Only if the "historical test" does not furnish answers must the Court resort to a "functional test," and thus look to other considerations, such as the distinction between fact and law, the nature of the remedy sought, and the relative capacities of judges and juries. *See Markman*, 517 U.S. at 384 n.10.

B. Governmental Takings, Both Direct And Indirect, Have Historically Been Subject To Review By Courts Alone

Whether in 1791, or later, no jury trial right has ever attached to the liability issues raised by "takings" claims. In keeping with this history, this Court has long recognized that there is no Seventh Amendment right to a jury trial, with respect to any issue, in an eminent domain proceeding, and jury trials have been permitted in such proceedings only as expressly sanctioned by statute or state constitution. While the Court has not yet so held with respect to regulatory taking claims, neither the Court's regulatory taking case law nor current practice in federal and state courts supports the conclusion that any regulatory taking issue other than "just compensation" must or should be tried to a jury.

The fact that "takings" issues have historically never been submitted to juries is in large part attributable to the nature of the eminent domain power on which both direct and indirect takings are based. The power of eminent domain is an "attribute of sovereignty" which is "an inherent power, necessary to the very existence of the government." 1 *Nichols*

On Eminent Domain § 1.14[2] (1997). The power "comes into being *eo instante* with the establishment of the government and continues as long as the government endures." *Id.* It does not "require recognition by constitutional provision, but exists in absolute and unlimited form," thereby necessitating the positive assertions of limitation on its scope found in the Fifth Amendment and state eminent domain statutes. *Id.*

In the federal Constitution (and commonly also those of the States), two elements limit the power. Appropriation of land must serve a "public use," and "just compensation" must be paid. While juries have historically been permitted to assess "just compensation," whether the taking was "necessary" for a "public use" has never been deemed an issue for the jury. *See, e.g., Kingsport Utils., Inc. v. Steadman*, 139 F. Supp. 622, 623 (E.D. Tenn. 1956) ("legality of the taking is not a jury question"); *Lustine v. State Roads Comm'n*, 142 A.2d 566, 567 (Md. 1958) (whether taking was "arbitrary, capricious and unreasonable" is a question "for the court, and not the jury, to pass upon"); *Kessler v. Thompson*, 75 N.W.2d 172 (N.D. 1956); *People v. Smith*, 21 N.Y. 595 (1860). To the contrary, the proceedings in which this issue was adjudicated, while admittedly "actions at law," were most often described as "special proceedings" in which the judge determined both the facts and the law, and a jury had no role. *See Kohl v. United States*, 91 U.S. 367 (1875); *Bouton v. Potomac Edison Co.*, 418 A.2d 1168, 1170 (1980) ("Condemnation proceedings were not ordinary suits at law. Rather, they were special proceedings, lacking the characteristics of ordinary trials, brought pursuant to the power of eminent domain, a power derived from the sovereignty of the state.").

The occasional historic use of special juries in non-judicial proceedings to assist in the disposition of limited eminent domain issues should not confuse the issue:

> The jury which was required in the ancient proceeding of inquest of office, by which highways were laid out in England at the time of the settlement of the American colonies, and which determined what damages would be suffered by the king or any other person, was not the common law jury of twelve presided over by a judge. . . . [T]he proceedings [in which such juries were used] were administrative and not judicial. . . The verdict of the jury did not determine whether the way should be laid out or not; that still remained for the sovereign to determine. Thus, the proceedings were merely an administrative inquest to enable the sovereign to better determine the advisability of establishing the proposed highway, and not a judicial proceeding by which the required land was taken.

1A *Nichols On Eminent Domain* §§ 4.105[1], 4.101[1].

In light of this history, this Court long ago held that, since no right to jury trial attached to eminent domain proceedings in 1791, no such right is guaranteed by the Seventh Amendment or available in federal or state courts unless provided for by constitution, statute or rule. *See United States v. Reynolds*, 397 U.S. 14 (1970); *see also Bauman v. Ross*, 167 U.S. 548 (1897); *United States v. Jones*, 109 U.S. 513 (1883); *Secombe v. Milwaukee & St. Paul R.R.*, 90 U.S. 108 (1874); *Curtiss v. Georgetown & Alexandria Turnpike Co.*, 10 U.S. 233 (1810). Many State constitutions and statutes now provide for a jury trial in direct condemnation cases, but only with respect to the issue of "just compensation." *See generally* 1A *Nichols on Eminent Domain* § 4.105[3]. Federal Rule of Civil Procedure 71A also allows only the issue of "just compensation" to be tried by the jury, subject to the discretionary power of the presiding judge to instead appoint commissioners. The far

more important issue of "public use" has been left, on a near universal basis, in the hands of the court alone.

While—as the conflict in the Circuits raised in the certiorari petition in this case demonstrates—this Court has yet to definitively address whether inverse condemnation claims require a jury trial, in the overwhelming majority of the Court's regulatory taking cases all issues other than "just compensation" are presumed to have been decided without a jury, as is evidenced by the *de novo* review the Court has invariably accorded to such issues. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). The Court's presumption has been borne out by practice in the vast majority of federal and state courts, where all questions related to whether a taking has occurred or can properly occur have generally been reserved to the Court. *See New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1092 (11th Cir. 1996) ("We have discovered no indication that the rule in regulatory takings cases differs from the general eminent domain framework, in which issues pertaining to whether a taking has occurred are for the court, while damages issues are the province of the jury."), *cert. denied*, 117 S.Ct. 2514 (1997); *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1550 (11th Cir.) ("the Court determines all issues, legal and factual, in an inverse condemnation suit, save the question of just compensation."), *vacated on other grounds*, 42 F.3d 626 (11th Cir. 1994); *see also Reisenauer v. Idaho*, 813 P.2d 375 (Id. 1991); *Van Dissel v. Jersey Cent. Power & Light Co.*, 438 A.2d 563 (N.J. Super. Ct. App. Div. 1981).[3]

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[3] Although not directly at issue on this appeal, what constitutes "property" and when it is "taken" have also traditionally been issues for the court alone. When this Court determined that land could be "taken"

Continued on next page

For purposes of seeking the best analogy between "old" and "new" to determine whether regulatory taking claims require jury trial, the historically demonstrable fact that such claims fit within the "general eminent domain framework" must prove ultimately dispositive. *Markman*, 517 U.S. at 378; *New Port Largo*, 93 F.3d at 1092. Indeed, the connection is more than by analogy: regulatory taking derives directly from eminent domain. As with eminent domain, inverse condemnation actions and claims of regulatory takings involve instances where government action allegedly "seizes" private property for public use, thereby triggering the Fifth Amendment obligation to pay "just compensation."

This Court itself has recognized the link on a number of occasions. Thus, in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court observed that "the entire doctrine of inverse condemnation is predicated on the proposition that a taking [based upon the power of eminent domain] may occur without . . . formal [condemnation] proceedings." *Id.* at 316. Similarly, in his influential dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), Justice Brennan concluded that "government action other than acquisition of title, occupancy, or physical invasion can be a 'taking,' *and therefore a de facto exercise of the power of*

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indirectly, as by flooding, it decided the case in favor of the owner as a matter of law. *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1871). When it determined that a regulation of property usage could "take" just as a direct seizure could, it decided the case in favor of the owner as a matter of law. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). When it determined that protectable "property" included "reasonable investment backed expectations," it decided the case in favor of the owner as a matter of law. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Thus, while the concept of "taking" expanded, the view that these were issues for the court alone, sitting without a jury, remained unchanged.

eminent domain, where the effects completely deprive the owner of all or most of his interest in the property." *Id.* at 653. Most recently in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court, in the course of surveying the development of inverse condemnation claims, commented upon "the practical equivalence" of "negative regulation and appropriation" in the eminent domain/regulatory taking context. *Id.* at 1018-19.

In light of all the foregoing, the link between the jury right in eminent domain and regulatory taking cases is too close to be obscured, as it was in the Ninth Circuit Opinion, by issues related to the distinction between fact and law, mixed questions of fact and law, or the nature of the remedy sought. The "historical test" is all that is required for full resolution of the question against the use of a jury.

C. Even If No Historical Link Existed Between Eminent Domain and Regulatory Taking Claims, "Functional Considerations" Would Require Denial Of Any Jury Trial Right For Regulatory Taking Claims

Where the "historical test" has not provided clear answers, this Court has acknowledged that "functional considerations also play their part in the choice between judge and jury." *Markman*, 517 U.S. at 388. In such cases, the jury trial right analysis may turn "on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Id.* (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)).

Two factors, evident in the case law, militate against jury determination of liability issues on a "takings" claim—the risk of non-uniform verdicts and the deference traditionally accorded to government land-use decisions.

The risk of non-uniformity relates to the very nature of "takings" decisions. Typically, the governmental action or

regulation challenged in a direct or indirect condemnation case affects more than one parcel of property over a large geographic area. The likelihood that juries may reach inconsistent verdicts with respect to adjoining parcels or parcels forming part of a larger plan argues in favor of leaving the "public use" decision in the hands of the court. *See Kingsport Utils., Inc. v. Steadman*, 139 F. Supp. 622, 623 (E.D. Tenn. 1956) (holding that "public use" determination is not a jury question because, *inter alia*, a condemnation decision can "have a cross-country application and [can]not be confined in its application to one individual's property."); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 863-64 (1987) (Brennan, J., dissenting) (commenting on "interdependence of land uses" and noting that "particular parcels are tied to one another in complex ways"); *see generally* Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 152 (1971); *cf.* Fed. R. Civ. P. 71A, Advisory Committee Note (allowing federal courts to dispense with jury on "just compensation" issue in eminent domain proceedings because "the jury system tends to lack of uniformity").

Under the "functional" analysis, the risk of such non-uniform verdicts has been an adequate basis for this Court to withhold other issues, such as patent construction, from jury determination. *See Markman*, 517 U.S. at 390. It should do the same with respect to regulatory taking liability issues.

The inherently deferential standard of review applicable to government land-use decisions furnishes an additional ground for withholding "takings" liability decisions from the jury. As set forth in greater detail *infra* Point II, courts may not impose their own views of necessity for exercise of the police power and, therefore, may not invalidate a governmental decision to "take" unless it is entirely without rational basis, and consequently "arbitrary and capricious." *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) ("deference to the legislature's 'public use' determination is

required 'until it is shown to involve an impossibility'"). Application of this "arbitrary and capricious" standard of review to government regulation and action is, under this Court's "functional" test, one of those things "that judges often do and are likely to do better than jurors." *Markman*, 517 U.S. at 388.

Application of the "arbitrary and capricious" standard has more often than not been left in the hands of the court because, as the Fourth Circuit explained in *Berry v. CIBA-Geigy Corp.*, 761 F.2d 1003, 1006-07 (4th Cir. 1985), "[t]he significance of the standard, while second nature to a judge, is not readily communicated to jurors." *See Adams v. Cyprus Amax Mineral Co.*, 954 F. Supp. 1470 (D. Col. 1997); *Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1259 (2d Cir. 1996); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir. 1984); *Wardle v. Central States S.E. & S.W. Areas Pension Fund*, 627 F.2d 820, 829-30 (7th Cir. 1980).

Application of this standard in an area as procedurally developed and politically charged as land-use planning would call for even more context-sensitive review of challenged decisions. As a result, the trier of fact on liability issues in a regulatory taking, no less than in a patent case, could be said to engage necessarily in "a special occupation, requiring, like all others, special training and practice." *Markman*, 517 U.S. at 388. Thus, with respect to such issues, "[t]he judge, from his training and discipline, is more likely to give a proper interpretation to such [issues] than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be." *Id.* at 388-89.

Accordingly, by resort to either the "historical test" or a "functional analysis," the Court should conclude that nothing in the history or nature of regulatory taking claims warrants that such claims be tried to a jury.

POINT II

THE NINTH CIRCUIT ERRED BY FINDING ALTERNATIVE BASES FOR LIABILITY ON REGULATORY TAKING CLAIMS AND APPLYING OTHER THAN A "RATIONAL BASIS" TEST TO DETERMINE SATISFACTION OF THE "PUBLIC USE" PRONG OF THE TAKINGS CLAUSE

The Ninth Circuit compounded its error in submitting Del Monte's regulatory taking claim to the jury by (1) incorrectly holding that the jury could find against the City of Monterey if the City's actions *either* did not satisfy a "public use" test *or* deprived Del Monte of all "economically viable use" for its property; and (2) improperly applying a "rough proportionality" and/or "reasonableness" standard to the "public use" prong of the regulatory taking analysis.

A. A Regulatory Taking Claim Will Only Lie When Both Prongs Of The *Agins* Standard Are Satisfied

As a threshold matter, the Ninth Circuit erred by finding two separate and alternative bases for liability on regulatory taking claims. In upholding the jury instructions in the trial court, the Circuit Court concluded that "[t]o prevail on its inverse condemnation claim, Del Monte had to show that the City's actions (1) did not substantially advance a legitimate public purpose; *or* (2) denied [Del Monte] economically viable use of its property." 95 F.3d at 1428 (emphasis added). By stating this standard in disjunctive terms, and thus assuming the existence of two independent theories of regulatory taking liability, the Ninth Circuit took to a new and problematic extreme an incorrect interpretation of this Court's precedent governing recovery for regulatory "takings."

The better reading of this precedent is, as set forth *infra*, that there is only one theory of regulatory taking liability, and it dictates that a regulatory taking claim will only lie where a

government regulation or action both satisfies the "public use" test and either physically occupies property or deprives property of all economically viable use. If government regulation or action cannot satisfy the "public use" test, and thus does not "substantially advance a legitimate state interest," it cannot amount to a taking and must be evaluated outside the Takings Clause. The Ninth Circuit Opinion ignores this basic premise, and would allow landowners to recover for purported "takings" by showing, *at their option*, *either* that challenged actions or regulations did not satisfy a "public use" test; *or* that the same actions or regulations deprived the property at issue of all "economically viable use."

1. *The Ninth Circuit Improperly Construed The* Agins *And* Penn Central *Two-Part Standard*

In so holding, the Ninth Circuit relied, directly or indirectly, on statements in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980), which appear to support such a disjunctive standard. In *Agins*, the Court suggested, in a statement that has been repeated in virtually every Supreme Court "takings" case since, that a regulatory taking claim would lie where government action *either* "does not substantially advance legitimate state interests" *or* "denies an owner economically viable use of its property." 447 U.S. at 260. The *Agins* standard echoed, in turn, the Court's suggestion in *Penn Central* that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, *or* perhaps if it has an unduly harsh impact on the owner's use of the property." 438 U.S. at 127.

While *Agins* and *Penn Central* say what they say, until the Ninth Circuit Opinion few, if any, courts had applied the disjunctive standard literally. *See Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 390 (1988). Most courts,

including this Court in its later non-"exaction" precedents, had simply repeated the *Agins* two-part standard, found that the action or regulation "substantially advance[d] legitimate state interests," and went on to decide the case (if at all) on the basis of the "economically viable use" test—with no consequent need to decide whether failure to satisfy the "substantially advance" test could in and of itself give rise to a claim. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485-87 (1987) (concluding that Pennsylvania Subsidence Act "advanced a legitimate state interest" and thus never assessing the fate of the claim if the Subsidence Act had not passed muster as a "public use"); *see, e.g., Clajon Prod. Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995); *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1080 (5th Cir. 1989); *Naegele Outdoor Advert., Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988); *Chang v. United States*, 859 F.2d 893, 896 (Fed. Cir. 1988); *Park Ave. Tower Assocs. v. City of New York*, 746 F.2d 135 (2d Cir. 1984).

In so doing, these courts, in effect, treated the *Agins* two-part standard as if it were conjunctive rather than disjunctive, and thus properly viewed as a variation on the "public use" and "taking" requirements of eminent domain cases. Under this construction, a compensable taking requires government action that "substantially advances" a public purpose (thus satisfying the "public use" prong of the Takings Clause) *and* that deprives property of "economically viable use" (thereby satisfying the "taking" prong of the Takings Clause).

The Ninth Circuit concluded otherwise, holding that the *Agins* standard is expressly disjunctive and requires the payment of "just compensation" either when government regulation does not serve a "legitimate state interest" or effects economic deprivation. In so doing, it presented the Court with an opportunity to end the confusion over the *Agins* standard by clarifying the standard so as to comport

more fully with both the language of the Takings Clause and its own regulatory taking precedents.

2. *The Disjunctive Standard Adopted By The Ninth Circuit Comports With Neither The Language Of The Takings Clause Nor The Court's "Takings" Precedents*

There is no "regulatory takings" clause of the Constitution, so the proper scope of liability for regulatory takings—including whether the standard is disjunctive or conjunctive—must rest on the words of the Fifth Amendment. The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." This language sets out three separate requirements, each of which must be satisfied before the payment of "just compensation" will be required: (1) the subject of the government action must be "property"; (2) the "property" must be "taken"; and (3) the "taking" must be for a "public use."

All three of these elements must be satisfied. However, the threshold requirement for any takings claim, without which no claim seeking "just compensation" can lie, is that the government's seizure (direct or indirect) be for a "public use." 1A *Nichols On Eminent Domain* § 4.1 (1997). This has long been recognized in eminent domain proceedings. Subject to according a high degree of deference, the court may inquire whether the "goal" of the "taking" constitutes a "public use" and whether the means adopted to achieve the goal are rational. When these questions are answered in the affirmative, the government has the absolute right to "take," subject only to the obligation to pay just compensation. *See Berman v. Parker*, 348 U.S. 26, 33 (1954) ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear."). If, however, it is shown that the property was to be taken for other than "public use," or that the means chosen to achieve an otherwise legitimate end lack a rational basis, the

condemnation cannot proceed, and no obligation to pay compensation ever arises because the government's attempt to "take" is void. *See Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) ("one person's property may not be taken for benefit of another private person without a justifying public purpose, even though compensation be paid"); *see also Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Cincinnati v. Vester*, 281 U.S. 439 (1930); *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896).

That the taking must serve a public purpose also has long been recognized as a necessary predicate for regulatory taking claims. Indeed, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and in most regulatory taking cases since, the courts have assumed that the regulations or actions at issue must themselves serve a public purpose. This Court expressly acknowledged this premise in *First English* in observing that the Fifth Amendment, in a regulatory taking context, "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of *otherwise proper interference* amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis added); *see Keystone*, 480 U.S. at 511 ("the existence of such a public purpose is merely a necessary prerequisite to the government's exercise of its taking power").

Since at least *Agins*, the Court has generally framed its evaluation of whether government regulation or action is, for these purposes, "otherwise proper" in terms of whether it "substantially advances legitimate state interests." Thus, in *Agins*, the Court acknowledged the need to undertake a Takings Clause "public use" analysis. It then proceeded to conduct such an analysis under the rubric of "substantial advancement," with reference chiefly to *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), a prototypical "public use" case, where deference was shown for the government's

exercise of the police power. Similarly, in his influential dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), Justice Brennan collapsed the "public use" and "substantial advancement" tests by observing that all "police power regulations *must be substantially related to the advancement* of the public health, safety, morals or general welfare." 450 U.S. at 656 (emphasis added). Most recently in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court characterized the "substantial advancement" test as a later "formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value," and therefore equivalent to the traditional "public use" test.[4] 505 U.S. at 1024, 1026. Thus, the Court, implicitly or explicitly, has treated "public use" and "substantial advancement" as a unitary standard and used the "substantially advance legitimate state interests" formula as a vehicle for conducting the same threshold "public use" analysis with respect to regulatory taking claims that it had traditionally conducted with respect to eminent domain claims.[5]

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[4] The Court's equation of the "public use" and "substantial advancement" tests is further supported by the origin of the latter test. *Agins* and *Penn Central* indicate that the phrase "substantially advance legitimate state interests" derives from *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), a substantive due process case which buries the phrase "substantial relation" in an overwhelmingly "rational basis" context: "a court should not set aside the determination of public officers in such a matter unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense.'" 277 U.S. at 187-88.

[5] The lone statement to the contrary is the Court's suggestion in *Nollan* that "the standards for takings challenges, due process challenges, and equal protection challenges are [not] identical" and that the test as to takings might be more stringent. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.3 (1987). However, *Nollan* was an exaction case,

Continued on next page

The Court has also acknowledged, in the regulatory taking no less than in the eminent domain context, that when the challenged action or regulation fails this "substantial advancement" test, the available remedies lie outside the Takings Clause. This principle was most clearly articulated by Justice Brennan in his *San Diego Gas* dissent. Justice Brennan there assumed, as the Court has done less explicitly in other cases, that it is the benefit to the public that warrants "just compensation." *Id.* at 656. However, where there is no benefit to the public because the regulation is not "otherwise proper," and thus does not "substantially advance a legitimate state interest," the Takings Clause provides no monetary remedy to the injured party:

> A different case may arise where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no "public use." Although [under such circumstances] the government entity may not be forced to pay just compensation under the Fifth Amendment, the landowner may nevertheless have a damages cause of action under 42 U.S.C. § 1983 for a Fourteenth Amendment due process violation.

San Diego, 450 U.S. at 656 n.23; *see First English*, 482 U.S. at 315; *Carson Harbor Village v. City of Carson*, 37 F.3d 468, 473 n.4 (9th Cir. 1994) ("When the effects of a regulation do not 'substantially advance a legitimate state interest,' compensation is not automatically due. Rather, the proper remedy for invalid exercise of the police power is

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not an ordinary regulatory taking case, so, as discussed in greater detail *infra* Point II.B, the standard it prescribes cannot and should not be applied outside the exaction context.

amendment or withdrawal of the regulation and, if authorized and appropriate, damages.")[6]

Subsequent courts, including the Ninth Circuit in this case, have failed to acknowledge these fundamental premises of "takings" jurisprudence. The resulting misinterpretation of the *Agins* standard has not wrought more havoc to date because, as explained *supra*, the vast majority of courts applying this standard, including this Court, have found the "legitimate state interest" or "public use" prong satisfied. Such, however, is not the case here. To the contrary, the Ninth Circuit Opinion squarely presents the question of whether landowners can recover for purported "takings" by showing, at their option, *either* that challenged actions or regulations did not satisfy a "public use" test; *or* that the same actions or regulations deprived the property at issue of all "economically viable use."

The answer to this question, we respectfully submit, should be no. A regulatory taking claim will only lie when based on a regulation that serves a "public use," so in order to state a claim a landowner must demonstrate to the court that: (1) the challenged regulation or action satisfies the "public use" or "substantial advancement" test; and (2) only if this is the case, that the regulation deprived the plaintiff of all economically viable use for its property or otherwise "took" the plaintiff's property. If the plaintiff cannot satisfy the first prong of this test, the regulation is invalid and the landowner cannot recover "just compensation" under the Takings Clause, although it may have damages claims under due

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6 The distinction in remedies is not idle. "Just compensation" has a special meaning differing from damages or fair market value. It denotes fairness, equality and justness—not only to the owner but to the public that must pay. *See Bauman v. Ross*, 167 U.S. 548 (1897); *United States v. 158.24 Acres of Land*, 696 F.2d 559 (8th Cir. 1982).

process, equal protection, or other constitutional or statutory theories of liability.

B. The "Legitimate State Interest" Or "Public Use" Prong Of The Regulatory Taking Test Must Be Evaluated Under A Rational Basis Standard

The Ninth Circuit also erred by holding that the "legitimate state interest" or "public use" issue should be decided by reference to a "roughly proportional" and/or "reasonableness" rather than a "rational basis" standard. The "rough proportionality" test is properly applied only in exaction cases such as *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), where the possibility of government extortion calls for a standard that can distinguish legitimate trade-off from illegitimate extortion. Where the government action does not involve an exaction, the Court should accord substantial deference to state or local government. In such instances, the standard of review properly applicable to the "public use" issue must be the "rational basis" standard that has always been applied to test the government's exercise (directly and indirectly) of its power of eminent domain.

1. Regulatory Takings Must Be Evaluated Under The Same Deferential "Public Use" Standard As Eminent Domain Takings

The Ninth Circuit held that the City of Monterey could only have shown that its actions "substantially advanced a legitimate state interest," and thus satisfied the "public use" prong of the regulatory taking test, by demonstrating that those actions, at a minimum, bore a "reasonable relationship" to its legitimate public purpose of environmental protection. 95 F.3d at 1429. In so doing, the Ninth Circuit underestimated both the deference traditionally accorded to government land-use decisions and the historical and practical links between eminent domain and regulatory taking claims, and consequently imposed on the "public use" prong

of the regulatory taking test a more stringent standard than warranted by controlling precedent or any other relevant considerations. This standard should be rejected by this Court.

The standard of review traditionally applied in eminent domain cases to assess whether property is taken for "public use"—and is thus a proper exercise of the eminent domain power—is extremely narrow and inherently deferential. As the Court held in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), what constitutes "public use" is "coterminous with the scope of the sovereign's police powers," and the determination as to what constitutes "public use" under any particular circumstance is left exclusively to the discretion of the legislature. *Id.* at 240. "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

Under this standard, there is a role for courts to play with respect to the "public use" determination, but it is an "extremely narrow one" because "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.* at 32, 33. Indeed, deference to the legislature's "public use" determination is required "until it is shown to involve an impossibility," *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925), or "unless the use be palpably without reasonable foundation." *United States v. Gettysburg Elec. Ry.* 160 U.S. 668, 680 (1896). It does not even matter that the government action does not accomplish its stated goal because, "whether in fact the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature rationally could have believed that [the regulation or action] would promote its objective." *Hawaii Hous. Auth.*, 467 U.S. at 242 (quoting *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981)). Thus, when the legislature's purpose is

legitimate and its means not irrational, this Court has repeatedly held that "debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." *Hawaii Hous. Auth.*, 467 U.S. at 242-43.

Under this standard, courts have generally only invalidated government takings on one of three bases: (1) the land was taken for "private" rather than "public use"; (2) the selection of the land to be taken was made in an "arbitrary and capricious" manner; or (3) the overall condemnation process was conducted in "bad faith." *See generally* 1A *Nichols On Eminent Domain* § 4.11[2]; *see, e.g., United States v. 416.81 Acres of Land*, 514 F.2d 627 (7th Cir. 1975); *United States v. 58.16 Acres of Land*, 478 F.2d 1055 (7th Cir. 1973); *Huntington Park Redev. Agency v. Norm's Slauson*, 219 Cal. Rptr. 365 (Cal. Ct. App. 1985); *Thompson v. Consolidated Gas Utils. Corp.*, 300 U.S. 55, 80 (1937); *Cincinnati v. Vester*, 281 U.S. 439 (1930); *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896). The courts have applied these exceptions sparingly.

There is no reason why the standard of review as to "public use" should be any different for regulatory taking claims than it is for eminent domain claims. As demonstrated *supra* Point I, the historical links between regulatory taking and eminent domain claims are extensive and compelling. The Court has looked to eminent domain jurisprudence for guidance as to both the substantive and procedural development of regulatory taking precedent. *See supra* Point I.B. Moreover, although this Court has formulated the standard in terms of "public use" in the eminent domain context and "substantially advancing legitimate state interests" in the regulatory taking context, the inquiry is the same in both contexts: Does government action lack a public purpose or any rational relationship to a public purpose so as to preclude government exercise of its otherwise sovereign power of eminent domain? It does not

matter that the government action in one case is by way of direct condemnation and in the other by way of regulation.

In recognition of this link between direct and indirect takings, this Court has repeatedly applied the "public use" standard to determine whether a challenged regulation "substantially advances legitimate state interests" in its regulatory taking analyses. Thus, in *Keystone Bitumious Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), the post-*Agins*, non-"exaction" case with the most extensive discussion of the "legitimate state interest" prong of the regulatory taking standard, the majority and dissenting opinions were in agreement that courts do not have "license to judge the effectiveness of legislation." *Id.* at 487 n.16. Indeed, in his dissent in *Keystone* Chief Justice Rehnquist cited, without apparent disapproval from the majority, the "public use" analysis of *Hawaii Housing Authority* as controlling, suggesting that so long as the governmental actor "rationally could have believed that [its action] would promote its objective," the "legitimate state interest" of the regulatory taking test is satisfied. *Id.* at 510 n.3.

Similarly, in *First English*—also involving a regulatory taking—the Court confirmed that "[n]othing we say today is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function 'for Congress and Congress alone to determine.'" *First English*, 482 U.S. at 321 (quoting *Hawaii Hous. Auth.*, 467 U.S. at 240). Most recently in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)—again, a regulatory taking case—the Court reaffirmed the validity of this deferential standard of review by denying that its decision in *Lucas* had the effect of "'altering the long-settled rules of review' by foisting upon the State 'the burden of showing [its] regulation is not a taking.'" *Id.* at 1016 n.6.

In light of all the foregoing, this Court should flatly reject the Ninth Circuit's attempt to change the standard of constitutional review in regulatory taking cases from one of

"rational relationship" between the challenged action and public purpose, which reflects deference to local decisionmakers, to one of "reasonableness" with a judge or jury free to find liability if it disagrees with the conclusion reached by the local legislative body.

2. *In No Event Should A "Rough Proportionality" Standard Be Applied Outside Of Exaction Cases*

Finally, the Ninth Circuit erroneously concluded that "[e]ven if the City had a legitimate interest in denying Del Monte's development application, its actions must be 'roughly proportional' to furthering that interest." 95 F.3d at 1430. It erred in so holding because the "rough proportionality" standard articulated by this Court in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is inapplicable to cases, like the present one, where no *quid pro quo* property exactions are at issue.

The "rough proportionality" standard is a specialized analysis, developed in *Dolan*, applicable exclusively to cases where the government has demanded property exactions from landowners. Property exactions, as the Court has itself observed, differ from other types of land use regulation in at least two ways. *Dolan*, 512 U.S. at 385.

First, property exactions entail "not simply a limitation on the use [an owner] might make of [its] own parcel, but a requirement that [the owner] deed portions of the property to the city." *Dolan*, 512 U.S. at 385. The Court has always treated physical occupations of land differently; indeed, there is a presumption that a physical occupation of land amounts to a taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). It is consequently not surprising that the Court would be "inclined to be particularly careful," and thus apply a more stringent standard, "where the actual conveyance of property [or an easement of access] is made a condition of the lifting of a land-use restriction, since in that

context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841(1987).

Second, unlike governmental regulations that are more generally applicable, an exaction involves interchange (or bartering) between government and the individual, where the individual agrees to an additional burden in exchange for a benefit granted by the government. Justifiable exactions, however, must be distinguished from extortion. The Court in *Nollan* and *Dolan* not unreasonably chose to do so through a different and more stringent test to ensure that there is a legitimate relationship between the benefit granted and the burden exacted.

Under the *Nollan/Dolan* test, local government must "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. By requiring "rough proportionality," it rationally distinguishes between extortion and what is, or could reasonably be thought to be, a trade-off. While exacting, this standard does offer a workable formula for dealing with circumstances where government seeks to exact a *quid pro quo* from a property owner for allowing him a benefit which government need not allow.

Analytically, moreover, the *Nollan/Dolan* test applies to the "taking" prong, not to the "public use" prong of the Takings Clause. The two prongs address different issues and, while each may require a connection between certain elements, those elements differ entirely depending on whether "public use" or exaction-as-"taking" is the subject of the analysis. In the "public use" context, one examines whether the government's action relates satisfactorily to a public purpose. When considering whether an exaction relates to a taking, one examines whether the benefit conferred upon the property owner reasonably relates to the

burden imposed on him. This is not a question of rationality in selecting means to achieve ends, but of whether the benefit conferred so lacks a reasonable relationship to the exaction sought as to require the conclusion that the government was extorting rather than imposing a reasonable condition. By applying a "rough proportionality" standard, the Ninth Circuit mistakenly imported the language of the *Nollan/Dolan* test out of the "taking" arena and into the "public use" arena. The Ninth Circuit had no cause to do so in this case because, although the City's responses to earlier Del Monte applications involved conditions for granting a permit, the action under judicial review was solely the City's ultimate denial of the permit.

Nothing in *Dolan* suggests a change in the settled "public interest" standard in non-exaction regulatory taking cases, like the present one, under which a challenged action need only bear a rational relationship to a legitimate public purpose. *See Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) ("Based on a close reading of *Nollan* and *Dolan*, we conclude that these cases (and the tests outlined therein) are limited to the context of development exactions where there is physical taking or its equivalent."). Here, the property owner objected to the denial of the permit, not to the conditions imposed on the granting of the permit, so the more stringent nexus test should not apply.

Nor, in light of the burdens to be imposed on local and state governments, should this Court lightly agree to take the "rough proportionality" standard and apply it in an entirely different context. The "rough proportionality" standard places the Court in a position of closely reviewing and evaluating—in effect, second-guessing—the reasoning of local government. Using this standard, the Court will be in the dubious position of questioning the expertise of the staff and legislative officials of state and local government and of substituting its own judgment for that of legislative bodies. *See Nollan*, 483 U.S. at 846 (Brennan, J., dissenting) ("State

legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation . . . ."). The Court should reserve such an activist role for the most intrusive forms of government regulation, such as exactions which entail a conveyance of property or physical intrusion on property, and under all other circumstances, defer to the expertise of the local legislative bodies.

If every state and local government planning decision were subject to second-guessing of this kind, it would become ever more difficult and costly for these government bodies to effectively regulate land use. *See Nollan*, 483 U.S. at 864 (Brennan, J., dissenting) (noting importance of state and local governments having "considerable flexibility in responding to private desires for development"). The courts should not place local governments in a position where they fear acting in a proper manner to regulate land use.

In light of all of the foregoing, the Court should reject the Ninth Circuit's attempt to apply a "rough proportionality" standard. Instead, the Court should follow the Fifth Amendment and settled precedent, which require no more than a rational relationship between government action and public purpose for satisfaction of the "public use" test.

CONCLUSION

The Court below erred in endorsing the use of a jury to decide regulatory taking liability issues and in applying a "rough proportionality" test to judge the "reasonableness" of regulatory action. In the course of doing so, it raised several ambiguities in existing statements of the law calling for this Court's clarification:

1. *Agins* suggests that the lack of "public use" and deprivation of "economically viable use" are alternative tests for finding a "taking." In fact, a seizure (or its equivalent by way of regulation) is not compensable at all under the

Takings Clause unless the government's action serves a "public use."

2. The phrase "substantially advance legitimate state interests" as a substitute for "public use" engenders confusion. Both phrases, in fact, require the same judicial deference to other branches' determinations of what police power objects and means are appropriate.

3. The "rough proportionality" and "nexus" tests set forth in *Nollan* and *Dolan* should only be applied to distinguish justifiable exactions from extortion where government seeks to exact a *quid pro quo* from a property owner for allowing him a benefit which government need not allow.

For all the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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